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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 49

DONALD I. TILTON, WILFRED L. BECK, JR., AND GUY H. McCLEARN, JR., PETITIONERS

v.

MISSOURI PACIFIC RAILROAD COMPANY

No. 53

ROBERT C. BROOKS, PETITIONER

v.

MISSOURI PACIFIC RAILROAD COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

1. *No. 49.* The findings of fact and conclusions of law of the United States District Court for the Eastern District of Missouri (Tilt. R. 97)[1] are not re-

[1] "Tilt. R." refers to the transcript of record in No. 49, *Tilton, et al.* v. *Missouri Pacific Railroad Company*; "B.R." refers to the transcript of record in No. 53, *Brooks* v. *Missouri Pacific Railroad Company*.

ported. The opinion of the Court of Appeals (Tilt. R. 105) is reported at 306 F. 2d 870.

2. *No. 53.* The opinion of the United States District Court for the Eastern District of Arkansas (B.R. 68) is not reported. The opinion of the Court of Appeals (B.R. 84) is reported at 308 F. 2d 531.

JURISDICTION

The judgment of the court of appeals in No. 49 (Tilt. R. 119) was entered on August 17, 1962. By order dated November 8, 1962 (Tilt. R. 120), Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including December 14, 1963. The petition for a writ of certiorari was filed on December 14, 1962, and was granted on February 18, 1963 (Tilt. R. 121).

The judgment of the court of appeals in No. 53 (B.R. 90) was entered on October 11, 1962. The petition for a writ of certiorari was filed on January 9, 1963, and was granted on February 18, 1963 (B.R. 91).

The jurisdiction of this Court in both cases rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of Section 9 of the Universal Military Training and Service Act (62 Stat. 614, as amended, 50 U.S.C. App. 459) are as follows:

* * * * *

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2)

makes application for reemployment within 90 days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than 1 year—

* * * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or

other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within 1 year after such restoration.

(2) It is declared to be the sense of Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner so as to give him such status as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

QUESTION PRESENTED

Whether, upon completion of training periods of fixed duration, veterans are entitled, under the Universal Military Training and Service Act, to be assigned seniority dates as journeymen based upon the date when they would have completed their training periods and obtained journeyman seniority had they remained continuously in their railroad employment during the duration of their military service.

STATEMENT

The four petitioners are veterans re-employed by the respondent Missouri Pacific Railroad Company. At the time of their induction into the military service, each was engaged in a 1040-day work program leading to eventual advancement from helper or apprentice to full journeyman status. Upon completion

of the program after their return from service, each was duly accorded journeyman status by the Railroad. At issue here is the right claimed by each of these petitioners, under Section 9 of the Universal Military Training and Service Act, *supra*, pp. 2–4, to have his seniority as a journeyman established as of the earlier date upon which he would have completed the work period and obtained journeyman seniority had he remained continuously in civilian employment.[2]

The nature of the employment relationship between the Railroad and each of the petitioners is as follows:

1. *Tilton, Beck* and *McClearn*. The Brotherhood Railway Carmen of America is the duly designated collective bargaining representative of the "carman" class of employees of the Missouri Pacific Railroad Company (Tilt. R. 36). At least since the early days of the Korean war, and continuing to the present time, the Railroad has suffered from a shortage of journeymen "carmen mechanics" (Tilt. R. 56). A collective bargaining agreement between the Brotherhood and the Railroad has provided methods for remedying that shortage (Tilt. R. 42). Under its terms, whenever the Railroad is unable to employ persons presently qualified as carmen mechanics, provision is made for the advancement or "upgrading" of "carmen helpers" to full carman status.[3] Representatives of the Railroad and the Brotherhood jointly

[2] The Government acts on behalf of the petitioners by virtue of Section 9(d) of the Universal Military Training and Service Act, 50 U.S.C. App. 459(d).

[3] The applicable portions of the agreement are contained in the Tilton Record, pp. 42–46.

select the helpers to be so advanced (Tilt. R. 43). A helper so "upgraded" can then be employed by the Railroad to perform the work of a journeyman carman mechanic and is entitled to be paid a carman mechanic's wages (Tilt. R. 40).

Under the agreement, however, the upgraded helper does not immediately acquire seniority as a carman mechanic. Rather, Section 3 of the agreement provides that the upgraded man retains his helper's seniority until he completes 1040 days of actual work as a carman mechanic (Tilt. R. 44). At the end of that time the upgraded helper is automatically considered a "qualified carman." He may then acquire a seniority date as a carman mechanic merely by making an election to that effect in writing.[4] As the Railroad's Chief Personnel Officer acknowledged, an upgraded helper who has completed his 1040 days of work as a carman and elects to obtain seniority as a carman mechanic must automatically be accorded that seniority (Tilt. R. 58–60).

---

[4] The agreement provides, in pertinent part (Tilt. R. 44–45):

"A helper who has been or who is later advanced to carman will retain seniority as helper. When he has completed a total of 1040 days of service as carman he shall be considered as a qualified carman. At the completion of the 1040 days of service he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper and will not again be considered in the selection of men for advancement under this agreement. He may, however, at a later date be employed as a carman and acquire a seniority date as carman as of the date so employed but will automatically lose seniority as a helper."

Section 2 of the agreement further provides that a list of temporarily upgraded men is to be compiled and maintained in the order of their upgrading (Tilt. R. 44). That section also states that, although the date of upgrading is not to be considered as "a seniority date":

> When force reductions are made, the demotion from carman shall be in the reverse order of upgrading as shown on the upgraded list, the last men upgraded to be the first men demoted.

(Tilt. R. 44.) Moreover, an upgraded helper has a prior right to perform any available carman mechanic's work ahead of any helper "upgraded" after him (Tilt. R. 28, 41).

Petitioners Tilton, Beck and McClearn were initially employed by the Railroad as "carmen helpers."[5] As employees in the carman craft, they were and are represented by the Brotherhood and covered by the collective bargaining agreement (Tilt. R. 36). Each of these petitioners was upgraded to temporary carman status pursuant to the agreement,[6] and prior to induction each of the petitioners had worked as upgraded carmen "on substantially every day when carman work was available to him" (Tilt. R. 28, 31, 34). However, each was inducted into the armed forces before he could complete the 1040-day work period necessary to qualify automatically as a journeyman

[5] Tilton was first so employed by the Railroad Company on July 13, 1949 (Tilt. R. 26); Beck on May 12, 1950 (Tilt. R. 29); and McClearn on May 24, 1950 (Tilt. R. 32).

[6] Tilton was upgraded on April 10, 1950, Beck on October 12, 1951, and McClearn on August 23, 1951 (Tilt. R. 37, 38, 39).

carman mechanic.[1] Upon his honorable discharge, each of the petitioners promptly returned to the Railroad, was reemployed as an "upgraded" carman, and thereafter completed the 1040-day work period necessary to qualify for journeyman status (Tilt. R. 37–40). When eligible, each immediately elected to acquire seniority as a carman mechanic (Tilt. R. 41).

In each case, the Railroad established the seniority of these petitioners as carman mechanics as of the date each actually completed the work period (Tilt. R. 38, 39, 40), although, as the court of appeals observed (Tilt. R. 109), in their absence many men junior to them were permitted to "jump" petitioners in seniority:

> Twenty-nine non-veteran helpers in Tilton's case, six in Beck's and five in McClearn's, began work as upgraded carmen after the particular plaintiff had been so upgraded. They continued to work in that capacity while the plaintiff was in military service. These men were able to complete the 1040 day work period and to elect carman seniority before the plaintiff did so. They accomplished this, however, after the plaintiff would have reached that goal had it not been for his absence in service, had he worked whenever carman work was at hand, and had carman status been selected by him in preference to the retention of helper's status

[1] Tilton left the Railroad's employ to enter military service on October 12, 1951, by which time he had worked 145 days as a carman (Tilt. R. 37); Beck left for the service on March 1, 1955, after having worked 851 days as a carman (Tilt. R. 39); and McClearn left for service on October 23, 1951, after 21 days of carman work (Tilt. R. 38).

with its more advanced seniority. These non-veterans are now ahead of the plaintiffs on the carmen's seniority roster. They enjoy over the plaintiffs those advantages, such as work preference, order of layoff, and order of recall, which that seniority dictates.

Petitioners instituted these actions in the district court on October 15, 1959 (Tilt. R. 1). Claiming that, under the Universal Military Training and Service Act, they were entitled to be restored to a position of seniority among the men who had remained behind at the precise places which they would have occupied had they kept their positions continuously instead of entering military service, petitioners sought to compel the Railroad to accord them seniority as journeymen from the date they would have completed the 1040-day work period but for their absence in military service. The district court dismissed all three actions after a hearing on the merits.

The court of appeals affirmed, rejecting petitioners' contention that the instant case was squarely governed by this Court's decision in *Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960. Relying, instead, upon its interpretation of *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, the court held that, in order for a veteran to be entitled to an advancement in status, "the promotion in question [must] be automatic and * * * seemingly * * * automatic as a matter of foresight rather than of hindsight" (Tilt. R. 115). The court concluded that advancement to full carman status in these cases did not meet that standard because it was subject to

"variables": lay-offs due to illness or reduction in force; the continuing unavailability of enough qualified carmen to fill carmen's positions; continuing satisfactory work by petitioners in the upgraded position; and petitioners' decisions as to whether or not to elect full carman status (Tilt. R. 116–117). Accordingly, the court held, the eventual acquisition by petitioners of journeyman carman status could not have been foreseen with absolute certainty at the time they left the Railroad's employ to enter military service and they were therefore not entitled, under the statute as interpreted in *McKinney*, to seniority in that status as of the time they would have achieved it but for their induction.

2. *Brooks.* Robert C. Brooks entered the employ of the respondent Missouri Pacific Railroad Company as an apprentice machinist at its Monroe, Louisiana, shops on July 5, 1951 (B.R. 7, 10). This employment relationship was (and is) subject to collective bargaining agreements between the Railroad and System Federation No. 2, Railway Employes' Department, A.F. of L.[8]

Under the terms of the agreements, advancement in status from apprentice to journeyman machinist is dependent upon completion of an apprenticeship program. This program consists of 1040 days of actual work as an apprentice and the satisfactory completion of a technical correspondence course (B.R.

[8] The "System Federation" is comprised of several unions representing non-operating railway employees, including *inter alia*, petitioner's union, the International Association of Machinists (B.R. 66).

23). The apprenticeship period is divided into eight periods of 130 days each. Rule 37 of the agreement provides in part (c) (B.R. 62) that, "[i]f within the first period of training an apprentice shows no aptitude to learn the trade, he will not be retained as an apprentice." After that period, however, an apprentice may not be dismissed "except for just and sufficient cause" (B.R. 62). Upon completion of his apprenticeship, a man qualifies as a journeyman machinist, although, prior to 1956, seniority in the latter status did not begin to run until the man was first employed in that capacity. The Railroad is obliged to hire such a qualified machinist in any situation where it is employing personnel other than journeymen (such as "upgraded" apprentices) to perform machinist's work (B.R. 51).

Seniority does not run generally throughout the Railroad's many workshops or "points." Rather, a man's seniority is restricted to the particular point at which he is employed (B.R. 44). If for any reason a journeyman is transferred to another point, he retains his qualification as a journeyman but goes to the bottom of the seniority ladder at the new point and also loses his seniority at his old shop (B.R. 61). The particular point at which a man holds seniority is of great importance. Continuing technological advances have reduced the frequency of overhauls of railroad equipment, with the consequence that many intermediate repair shops have been eliminated (B.R. 44–46). Seniority at a shop which is no longer used is obviously of little or no value.

Brooks left the Railroad to enter military service before he completed his 1040-day apprenticeship. He was inducted on February 1, 1952, honorably discharged on November 7, 1953, and reinstated as an apprentice machinist at Monroe, Louisiana, on November 23, 1953 (B.R. 7, 10). However, the apprenticeship program at Monroe was terminated and petitioner laid off on April 29, 1954, because of a reduction in force (B.R. 8, 11). In response to the Railroad's call for apprentice machinists, Brooks transferred to the Railroad's St. Louis, Missouri, shops on July 6, 1954, where he continued in the apprentice machinist at Monroe, Louisiana, on No apprenticeship program. On July 25, 1955, Brooks requested and was granted a transfer to the Railroad's North Little Rock shops, where he completed his apprenticeship on January 23, 1958. He was immediately employed there as a journeyman machinist (B.R. 8, 11).

The Railroad established Brooks' seniority as a journeyman at North Little Rock as of January 23, 1958 (B.R. 8, 11), the date he actually completed his apprenticeship. Brooks protested this seniority date. He demanded that his seniority at North Little Rock be fixed retroactively as of the date he would have completed his apprenticeship but for his military service. The Railroad offered Brooks such retroactive seniority, but only at its Monroe, Louisiana, shops (B.R. 11).* Brooks refused this offer as there was no work for machinists at Monroe.

*This offer was based upon the Railroad's construction of its collective bargaining agreements with the Union. In December of 1945, the Union and the Railroad had entered into

Brooks brought suit in the district court on September 20, 1960, under the Universal Military Training and Service Act, to compel the Railroad to accord him a retroactive seniority date as a journeyman at North Little Rock. The parties stipulated to the effect that, had Brooks remained in the Railroad's employ and not entered military service, he would have completed the apprenticeship period on November 3, 1955, and achieved seniority accordingly (B.R. 19).

The district court held that Brooks was entitled to retroactive seniority, finding that (B.R. 78):

> [T]he record here discloses that plaintiff had a contractual right under the basic agreement to complete his apprenticeship, that he would have completed the same in 1955 had he not been called into military service, and that had he completed it at that time he would, in point of practice, have been hired automatically as a journeyman machinist with seniority as of the date of completion of his apprenticeship.

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a "Memorandum of Understanding" as to the effect of what is now Section 9 of the Universal Military Training and Service Act upon the status of employees called into military service. That Memorandum provided, *inter alia* (B.R. 59), that:

"An apprentice who has entered military service and upon completion of such service returns to the railroad in accordance with the law and resumes his training as an apprentice, will, upon completion of his apprenticeship, be given a seniority date as of the date he would have completed his apprenticeship had he remained in the railroad service."

This Memorandum was construed by the parties as granting retroactive seniority only at the place where the veteran began his apprenticeship.

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The court further ruled that this seniority should be determined at North Little Rock and not Monroe, Louisiana. Granting seniority at Monroe, Louisiana, the court found, would depend upon hypothesizing events which could never have occurred, for the apprenticeship program at Monroe had terminated before Brooks could have completed it even had he not gone into service. The court observed that Brooks (B.R. 79):

> would have been required to complete his training in some other shop, and, on November 3, 1955, when training would have been completed plaintiff actually was employed at North Little Rock.

The court held that it was thus "not speculative" to conclude that, under the Act, plaintiff was entitled to retroactive seniority at North Little Rock.

The court of appeals reversed, relying upon its decision in *Tilton, et al.* v. *Missouri Pacific Railroad Company, supra.* It ruled that the date of Brooks' initial employment as a journeyman was unforeseeable because (B.R. 88):

> The balance between supply and demand of a particular category of workmen at a designated point at a future date cannot be foreseen or predicted with any degree of certainty.

Consequently, under the rule it had laid down in *Tilton,* Brooks' eventual advancement in status to journeyman at North Little Rock in 1955 was not "automatic" because it could not have been positively foretold in 1952 when he went into service.

SUMMARY OF ARGUMENT

I

Section 9 of the Universal Military Training and Service Act directs that veterans be restored to their civilian jobs without loss of status or seniority because of having served their country. The protection afforded by the statute assures that "those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service." *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 270, 272. This Court has construed the statute to mean that where advancement is dependent solely upon completion of a period of training which has been interrupted by military service a veteran is entitled to a seniority date in the higher position which reflects the delay caused by his induction. *Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960.

II

Petitioners would have achieved the earlier seniority dates they now seek, simply by virtue of continued employment, but for their absence in military service. They were employed by the respondent railroad as apprentices or "upgraded" helpers—positions which led to automatic advancement to journeyman status after 1040 days of work. Each was called from his job, before completing the work period, to serve in the armed forces of the United States. Upon his return and completion of the interrupted work period, the railroad gave him journeyman's status, but with seniority

junior to his non-veteran co-workers who had continued uninterruptedly with the railroad. Each petitioner asks only that his seniority as journeyman be back-dated to the time he would have completed the 1040-day work period and automatically qualified as journeyman had military service not intervened, *i.e.*, that he be restored to his proper place among those who did not enter the armed forces. This is the very right that this Court held to be protected in the *Diehl* case.

III

The Eighth Circuit denied petitioners their claimed seniority because, viewed from the time of petitioners' entry into service, the dates upon which they would complete the 1040-day training period and acquire journeyman status could not be foreseen with certainty. There were, the court said, unpredictable "variables," *e.g.*, the continuing availability of work to be done, the state of the trainees' health, satisfactory performance, etc. Although similar variables were present in the *Diehl* case and were not held by this Court to be controlling, the court of appeals was of the view that *McKinney, sub silentio,* had overruled *Diehl* on this point.

This reliance on *McKinney* is misplaced. *McKinney* held only that the statute affords the veteran no assistance where management discretion, and not merely continued employment, plays a role in selecting persons to be advanced. The opinion made no mention of any requirement of absolute foreseeability and, indeed, itself strongly supports the conclusion that no such requirement exists. For the Court per-

mitted the veteran to plead anew and to prove, if he could, that in actual practice the promotion he sought would have been his simply by virtue of continued employment. Certainly, it was apparent that the facts of *McKinney* involved most of the "variables" present in the instant case.

The lower court's approach would defeat a fundamental purpose of Section 9 of the Act: to restore the veteran "in such manner so as to give him such status as he would have enjoyed if he had continued in such employment * * *." Continued satisfactory work, absence of serious illness, willingness to accept promotion, future changes in the industry—all of these are variables which are inevitably in the picture and can never be predicted with absolute certainty. To hold that one or more of these variables defeats a claim to advanced status or seniority is to say in substance that Section 9 has failed to achieve its objective and that the "escalator" principle (see *Oakley* v. *Louisville & Nashville R. Co.*, 338 U.S. 278, 283) leads nowhere.

ARGUMENT

I. SECTION 9 OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AS CONSTRUED BY THIS COURT, GRANTS VETERANS THE RIGHT TO BE RESTORED TO THE SENIORITY THEY WOULD HAVE ACHIEVED SIMPLY BY VIRTUE OF CONTINUED EMPLOYMENT DURING THEIR ABSENCE IN SERVICE.

Petitioners bottom their claim for relief upon Sections 9(c)(1) and 9(c)(2) of the Universal Military Training and Service Act (*supra*, pp. 3–4). In Section 9(c)(1), Congress directed that veterans returning from military service be restored to their civilian

employment "without loss of seniority." The Court first considered this requirement in *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, when it construed the same provision in an earlier Act.[10] There the Court said: "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence." The protection granted the veteran was summarized as follows (328 U.S. at 284–285):

> Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * *

This "escalator principle" was reaffirmed by the Court in *Trailmobile Co.* v. *Whirls*, 331 U.S. 40,[11] and approved and restated in *Oakley* v. *Louisville & Nashville R. Co.*, 338 U.S. 278, 283, as follows:

> * * * [A]n honorably discharged veteran, covered by the statute, [is] entitled by the Act

[10] The present section is a reenactment of Section 9(c)(1) of the Selective Service Act of 1948, 62 Stat. 604, 614, as amended, 50 U.S.C. App. 459, which in turn reenacted Section 8(c) of the Selective Service and Training Act of 1940, 54 Stat. 885, 890, as amended, 50 U.S.C. App. (1946 ed.) 308. See, *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 271.

[11] In *Trailmobile*, the Court stated that the "restored veteran * * * could not be disadvantaged by his service to the nation" (331 U.S. at 58) and that his standing as a restored veteran includes "not only his seniority status as of the time he entered the armed forces, but also all that would have accumulated had he remained at work until the date of his reemployment without going into the service" (331 U.S. at 56).

> to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment.

As this Court noted in *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 271, this interpretation is now embodied in Section 9(c)(2) of the present Act, which provides:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.[12]

In applying the foregoing principle to concrete situations, this Court has followed a careful and consistent course succinctly summarized in *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 272:

> Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will

[12] 62 Stat. 604, 615–616, as amended, 50 U.S.C. App. 459(c)(2).

not be denied the veteran because of his absence in the military service. * * *

Section 9 of the Act, in other words, fully protects the veteran in his enjoyment of precisely that status and seniority which, under applicable collective bargaining contracts, he would have enjoyed simply by virtue of continued employment during the time he was in military service. Thus, the Court has held that a restored veteran is not entitled to super-seniority over non-veterans, for he would not have enjoyed this had he remained in continuous employment. *Fishgold* v. *Sullivan Corp., supra.* Similarly, a veteran has no right to advancement to a new position when advancement depends upon the exercise of discretion vested in the management, because such advancement does not depend merely upon continued employment during the time of military service. *McKinney* v. *Missouri-Kansas-Texas R. Co., supra.* Moreover, while the statute assures the returning veteran that he will enjoy a position equal to that which he would have gained by continuous employment, applicable collective bargaining agreements define the rights and benefits of this position. The statute grants no protection from loss of seniority in common with all fellow employees, veteran and non-veteran, resulting from a new collective bargaining agreement executed after the merger of the employer with another corporation, *Trailmobile Co.* v. *Whirls,* 331 U.S. 40; it does not provide seniority ahead of union officials where, under a collective bargaining agreement, their special status gives them seniority over all others regardless of length of service, *Aeronautical*

Lodge v. *Campbell*, 337 U.S. 521; and it does not furnish a right to object that, under applicable collective bargaining agreements, military service time was credited toward the seniority of other employees also, although they joined the company after service rather than before induction, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330. In sum, the veteran can claim only those benefits which are accorded, simply as a result of continued employment, to workers in the veteran's situation who continued in employment during the period of his absence.

Those benefits include advancements in position. In *McKinney* v. *Missouri-Kansas-Texas R. Co.*, *supra*, the Court, while rejecting a veteran's claim to advancement in position where promotion appeared to depend upon an exercise of managerial discretion and not simply continuous employment, nevertheless expressly afforded the veteran an opportunity to prove his entitlement to the higher status by demonstrating that, under actual custom and practice, he would have obtained the promotion in ordinary course. See, also, *Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960; *Oakley* v. *Louisville & Nashville R. Co.*, 338 U.S. 278, 281; *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C.A. 6); *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C.A.D.C.), certiorari denied, 339 U.S. 919.

The protected benefits of continued employment have also been held to include the right, upon completion of a fixed training period, to be assigned a seniority date as a journeyman based upon the date when the veteran would have completed his training period

and automatically obtained journeyman status had he remained continuously in his employment during the period of his military service. A returning veteran cannot claim a promotion that depends solely upon completing a prerequisite period of employment training unless he first works that period but, upon completion of that period of training, he can insist upon a seniority date in the higher position which reflects the delay in completing the requisite period of training caused by military service.

This precise issue was litigated and decided in *Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960, reversing 211 F. 2d 95 (C.A. 3) which involved an employment situation almost identical to that of petitioners Tilton, Beck and McClearn. Diehl was a carman helper, temporarily "upgraded" to carman status. he was inducted into service from this upgraded position and, upon his return to the Railroad, restored to it. An agreement between the Railroad and the Union provided that upgraded men who had completed 1160 days of work in that capacity could elect journeyman carman status. It further provided that one electing journeyman status would be entitled to seniority "in the order with other men in which he completed 1160 days experience * * *" (211 F. 2d at 97). Upgraded men junior to Diehl had completed the work period. while he was in service and for that reason were given seniority ahead of Diehl. Upon completion of the training period, Diehl protested, claiming that, under Section 9 of the Act, he was entitled to seniority as of the earlier date on which he would have completed the work period but for his absence in military service. The Third Circuit held,

against the veteran, that the Act protects only rights which are a mere function of time in grade and does not entitle the veteran to be treated as if he had been actively employed or trained during the period of military service. This Court reversed, *per curiam*, holding that, upon the basis of facts stated in the opinion of the Third Circuit, Diehl was entitled to the seniority he claimed. 348 U.S. 960. The Court cited its opinion in *Oakley* v. *Louisville & Nashville R. Co.*, 338 U.S. 278. In *Oakley* it had said (338 U.S. at 283) that the Act entitles the veteran to be restored "to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment."

A similar result was reached in *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C.A. 6), which involved an apprentice photo-engraver. At the time of his induction into the service, the governing collective bargaining agreement required six years of practical experience in order to become a journeyman. The Sixth Circuit held that, upon reemployment and completion of the apprenticeship period, the veteran was entitled under the Act to the seniority date he would have achieved had he not entered service, thus restoring him to his proper position among those who had remained in the employer's service. See, also, *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C.A.D.C.), certiorari denied, 339 U.S. 919; *Borges* v. *Art Steel Co.*, 246 F. 2d 735 (C.A. 2); *Morris* v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579 (C.A. 7), certiorari denied, 336 U.S. 967; cf. *Spear-*

mon v. *Thompson*, 167 F. 2d 626 (C.A. 8), certiorari denied, 335 U.S. 822."

Thus this Court's decisions have established (1) that veterans such as these petitioners are entitled to all of "those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment" (*McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 272) and (2) that the right to these advancements in status includes the right, upon completion of a training period of employment, to be accorded a retroactive seniority date as if the veteran had been continuously and actively employed during his period of military service (*Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960). It is against these standards that the present case must be decided.

II. BUT FOR THEIR ABSENCE IN THE ARMED SERVICES, PETITIONERS WOULD HAVE ACHIEVED EARLIER SENIORITY SIMPLY BY VIRTUE OF THEIR CONTINUED EMPLOYMENT

Each of these petitioners would, at an earlier date, have achieved journeyman seniority simply by virtue of continued employment, but for their absence in military service.

A. TILTON, BECK, AND MCCLEARN

Tilton, Beck, and McClearn had each been selected for "upgrading" from carman helper to temporary

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[11] *Bostian* v. *Seaboard Air Line R. Co.*, 211 F. 2d 867 (C.A. 4); *Addison* v. *Tennessee Coal, Iron & Railroad Co.*, 204 F. 2d 340 (C.A. 5); and *Gregory* v. *Louisville & Nashville Railroad*, 191 F. 2d 856 (C.A. 6), certiorari denied, 343 U.S. 903, were decided prior to, and overruled by this Court's decision in, *Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960.

carman *before* his induction. Under the collective bargaining agreement, this was the sole point at which the Railroad exercised its discretion to promote men from helper to carman (Tilt. R. 43). Once a helper was "upgraded," he had a right, under the agreement, to do carman's work ahead of any man upgraded after him whenever such work was available. Moreover, throughout the absence of these petitioners, the Railroad was short of qualified journeymen to do carmen's work (Tilt. R. 40, 56). Finally, the agreement specifically provided that, at the end of 1040 days of work as a temporary carman, an upgraded helper "shall be considered as a qualified carman," with the contractual right to elect seniority as such (Tilt. R. 44)."

There is no room for doubt then, that, had Tilton, Beck and McClearn remained continuously on the job, they would have been able to complete the work period and qualify as journeymen in advance of those

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"Mr. Smith, the Railroad's Chief Personnel officer, confirmed that the Railroad had no discretion to refuse journeyman status to a helper who had completed the work period (Tilt. R. 58–59):

"Q. Now, you have testified that these men, when they completed their three years or thousand and 40 days of work, did not automatically acquire carman seniority. As soon as they made an election, the railroad had no choice but to give them seniority, did it?

"A. [Mr. Smith] Under the '42 agreement?

"Q. Under either the '42 agreement or the '53 agreement.

"A. [Mr. Smith] That's right.

"Q. In other words, as soon as they completed the work requirement, made the election as of that time, they became carmen and drew a seniority date?

"A. [Mr. Smith] Correct."

who "jumped" them in seniority during their absence. Each was entitled, under the agreement, to do carman's work ahead of any man upgraded after him. It was only because of petitioners' military service that men upgraded after them were able to work more days as carmen and to qualify as journeymen before them (Tilt. R. 40, Stip. 29).[18] But for their absence, petitioners would have qualified as journeymen carmen and achieved the seniority dates they now claim.

B. BROOKS

Petitioner Brooks would also have achieved journeyman status at North Little Rock at an earlier date had he remained in the Railroad's employ instead of entering the armed forces. Brooks was hired by the Railroad as an apprentice machinist at Monroe, Louisiana, on July 5, 1951. After serving about seven months of his apprenticeship, he was inducted into military service. He returned to the Railroad after his release and was reinstated as an apprentice at Monroe in November of 1953. (B.R. 7.) The apprenticeship program was terminated at Monroe, Louisiana, on April 29, 1954, and Brooks was laid off. However, in response to the Railroad's request for apprentices at St. Louis, he transferred to that city and continued his apprenticeship (B.R. 8). On July 25, 1955, with the Railroad's permission, Brooks transferred to the North Little Rock shops (B.R. 8). There he completed his apprenticeship on January 23, 1958, and

[18] The Railroad conceded that each of petitioners had worked as a carman on substantially every day upon which such work was available to them (Tilt. R. 28, 31, 35).

was immediately employed as a journeyman machinist (B.R. 8).

Having been hired as an apprentice (prior to entering military service), Brooks had a contractual right under the collective bargaining agreement to complete his apprenticeship (B.R. 78; 62.) The Railroad calculated that, if Brooks had not entered the military service, he would have completed the apprenticeship period on November 3, 1955. While journeyman's seniority prior to 1956 depended upon employment as a journeyman and not simply completion of the apprenticeship period, on November 3, 1955 (when Brooks would have completed his apprenticeship had he not been in military service), Brooks would have automatically been employed at North Little Rock (where he in fact was on this date) as a journeyman (B.R. 78–79).

The district court found that:

> While it is true that Rule 51 of the 1949 agreement appears to give the railroad some theoretical discretion in the employment of mechanics from the ranks of graduating apprentices, the evidence shows that in practice such discretion had no play, and that transition from the rank of apprentice to the rank of journeyman was automatic.

This finding is overwhelmingly supported by the record. It is undisputed that so long as there was journeyman's work being performed by upgraded apprentices the Railroad had no discretion to refuse to hire Brooks as a journeyman after he had completed the 1040-day apprenticeship work period (B.R.

50–51)." On November 3, 1955, and thereafter, there were upgraded apprentices working as journeyman machinists at respondent's North Little Rock shops (B.R. 21–23). The railroad would therefore have been obligated to hire Brooks as a journeyman at once unless it was prepared to downgrade all upgraded apprentices and forego having its machinist's work done. That this latter alternative to hiring Brooks on November 3, 1955, is wholly fanciful is indicated by the testimony of the Railroad's Special Assistant for Personnel who testified that an upgraded apprentice who completed his apprenticeship while upgraded "undoubtedly" would have been employed as a journeyman (B.R. 56):

> The WITNESS. * * * if an apprentice is upgraded he is upgraded because there is a shortage of mechanics and that shortage would

[16] Mr. Armstrong, the Railroad's Special Assistant for Personnel, testified that the Railroad would be obligated to employ an apprentice who completed his apprenticeship and applied for work at a "point" if, at the time of his application, the Railroad had upgraded apprentices doing journeyman's work at that point (B.R. 51):

"The WITNESS. * * * we have a right to upgrade apprentices when there is a shortage of machinists when it can be demonstrated that there is a machinist, a mechanic who wants the job, then we no longer have a right to upgrade the man in preference to hiring the machinist.

"The COURT. Well, now, I'm not talking about your right to upgrade; I am talking about your obligation to employ a particular individual. Once an apprentice has completed his apprenticeship, if there is work available and if he meets the physical and mental requirements, is the Railroad obliged to employ him if he wants to work, even though he has not one minute seniority?

"The WITNESS. I would say yes."

> continue through the time that he completes his apprentice training, and since we have said there is a shortage of mechanics we would undoubtedly employ him as a mechanic and he would continue to work in the shop. Now, the particular job he might work on might change because of the change in his status.
>
> Q. You undoubtedly would employ him? A. He would be upgraded only because there was a shortage of mechanics, machinists.

Finally, it is plain that Brooks was entitled to retroactive seniority as a journeyman at North Little Rock and not—as the respondents contend—at Monroe, Louisiana. As the district court found, under the actual practice of the Railroad and the Union, seniority is established at the point where a man is first employed as a journeyman (B.R. 80; B.R. 26–27). It is not a matter of speculation where Brooks would have begun work as a journeyman but for his military service. Brooks' absence in military service affected only the completion date of his apprenticeship—not his point of service on the Railroad. As already noted, after his military service Brooks returned to his apprenticeship at Monroe. But the apprenticeship program there was discontinued by the Railroad on April 23, 1954, almost eighteen months before Brooks would have qualified as a journeyman *even if he had never entered the military service.* In no circumstances, therefore, could Brooks have achieved seniority at Monroe.

Brooks transferred, as an apprentice, first to St. Louis (at the Railroad's request) and then to North Little Rock on July 25, 1955 (at his own request), both transfers occurring before he would have quali-

fied as a journeyman even had he not gone into service. Thus, we have here no attempt to reconstruct the past in order to take advantage of "what might have been." Rather, we have routine transfers by an apprentice, and there is no reason to presume that he would have proceeded differently had his employment continued uninterrupted. The district court was therefore warranted in finding, as it did, that Brooks would have been working at the Railroad's North Little Rock shops on November 3, 1955, the date upon which he would have completed his apprenticeship had he not gone into the Army (B.R. 80). That, of course, is exactly where he was on that date.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT A RESTORED VETERAN IS ONLY ENTITLED TO SUCH AUTOMATIC ADVANCEMENT IN STATUS AS COULD BE FORESEEN WITH CERTAINTY AT THE TIME HE ENTERED THE ARMED FORCES

We have demonstrated that each of the petitioners would have achieved the earlier seniority he claims simply by virtue of continued employment if he had not entered the armed services. The Eighth Circuit, however, denied the petitioners their claimed seniority because the date of completing the 1040-day training period and obtaining journeyman status, if viewed from the date of entry into military service, was subject to a number of variable factors. In its opinion in *Tilton*, the court listed the factors as including (Tilt. R. 116–117): whether work counting toward the training period would have been available; whether the trainee would have chosen and been in sufficient health to do the work; whether the trainee's

work would have been satisfactory to prevent discharge or reduction in status for cause; whether the veteran would have decided to relinquish seniority in the lesser position for the other benefits of the higher position. The Eighth Circuit acknowledged that most, if not all, of these uncertainties may have been dispelled by later events and that, at the time of suit, one could establish as a matter of fact that the veteran would have obtained the seniority position he now claimed (Tilt. R. 115). But, the court reasoned, this showing did not satisfy what it believed was probably a requirement imposed by the *McKinney* case (Tilt. R. 115):

> * * * that the promotion in question be automatic and that, seemingly, it be automatic as a matter of foresight rather than of hindsight.

Each of the variables or uncertainties relied upon by the Eighth Circuit was also evident in *Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960, and plainly regarded by this Court as not controlling the result.[17] But the court of appeals construed the *Diehl* case so narrowly, and indeed inconsistently,[18] that it is ap-

[17] Most of these variables would also have been evident, though ignored by this Court, in one of the cases dealt with in *Oakley* v. *Louisville & Nashville R. Co.*, 338 U.S. 278, 281.

[18] The Eighth Circuit distinguished *Diehl* on the ground that "there was no uncertainty involved in the Diehl facts," because there it was stipulated that the claimant "'would have completed' the work period on a given date if there had been no military service interruption" (Tilt. R. 115–116). However, respecting petitioner Brooks, as to whom there was such a stipulation (B.R. 16), the court nevertheless rejected the veteran's claim on the ground that (B.R. 88):

"* * * The balance between supply and demand of a particular category of workmen at a designated point at a future date cannot be foreseen or predicted with any degree of certainty. * * *"

parent that it believed *Diehl* had been, for all practical purposes, overruled by *McKinney*. "[I]f *Diehl* and *McKinney* are in any way inconsistent in their holdings," it observed, "we must necessarily follow *McKinney* as the latest pronouncement by the Supreme Court" (Tilt. R. 117).

We submit, for several independent reasons, that *McKinney* was not intended to overrule *Diehl* and *Oakley*, and that a veteran is still entitled to all of the benefits, including advancements, that would have resulted simply from continued employment, whether or not this beneficial result would have been foreseeable as a certainty at the time of entry into military service.

A. There is not a mention of *Diehl* or of a requirement of foreseeability in the *McKinney* opinion. The reason, we submit, is that *McKinney* was concerned with a discrete problem. That case involved the applicability of Section 9 to claims for benefits that depend upon factors *other than continued employment*, such as lost opportunities for advancement by promotion on a merit basis or by election to union office. *McKinney* holds that the statute was intended to protect only those "changes and advancements in status that would necessarily have occurred simply by virtue of continued employment" (357 U.S. at 272) and not "all its possibilities of betterment" that "might have flowed from experience, effort, or chance" (357 U.S. at 272 and 271). It does not deal with the *Diehl*-type situation where advancement depends simply on continued employment.

McKinney was a railroad employee who held a "group 2" position when he went into service. In his absence, some positions in "group 1," a more desirable category, fell vacant. Under the governing collective bargaining agreement, when group 1 openings occurred, employees "in group two (2) [would] be given preference over nonemployes in the assignment to positions in group one (1), based upon fitness and ability * * *" (357 U.S. at 266–267). When McKinney returned from service he was given one of the group 1 positions. That position was subsequently abolished and McKinney dropped to a group 2 job. He protested, claiming that he should have been entitled to "bump" a nonemployee who had been hired to fill one of the other group 1 vacancies in his absence. The Court rejected his claim, noting (357 U.S. at 272):

> Promotion to a group 1 position from group 2, in which petitioner had formerly been employed, is not dependent simply on seniority. Under Rule 1(3)(A) of the collective bargaining agreement it is dependent on fitness and ability and the exercise of a discriminating managerial choice. * * * The statute does not envisage overriding an employer's discretionary choice by any such mandatory promotion. * * *

The factual determination that the exercise of the employer's discretion was a prerequisite to promotion of course dictated the conclusion that the advancement was not dependent upon continued employment alone.

B. The *McKinney* decision itself makes clear that the Court did not intend to adopt any rule of absolute foreseeability. McKinney had argued, alternatively.

that, because his claim was dismissed on motion in the district court, he did not have the opportunity to prove that "by custom and practice under the collective bargaining agreement he would necessarily have been assigned to the group 1 position * * * had he remained continuously in respondent's employ." 357 U.S. at 273. This Court affirmed the judgment, but granted McKinney "leave to petitioner to amend his complaint to allege, if such be the fact, that in actual practice under the collective bargaining agreement advancement from group 2 to group 1 is automatic". 357 U.S. at 274. Plainly, if the Court had intended to adopt a rule of absolute foreseeability of automatic advancement at a certain date, it would not have permitted McKinney to plead anew. For it was apparent that McKinney could never have predicted "with any degree of certainty," when he left for service, that (1) a group 1 position would fall vacant in his absence; (2) that he would elect to bid for it; (3) that he would be in adequate health to bid for it; and (4) that he would not have already lost his lower position because of unsatisfactory performance.

C. Most importantly, the Eighth Circuit's approach would necessarily defeat the achievement of the fundamental purpose expressed in Section 9(c)(2): to restore the veteran to his employment "in such manner so as to give him such status as he would have enjoyed if he had continued in such employment * * *."

For example, continued satisfactory work is invariably a precondition of continued seniority in a position. If the bare possibility that the veteran would

not have worked satisfactorily during the period of his absence bars a claim to the statutory protection, Congress was mistaken in thinking that even the most basic seniority rights would be safeguarded during the veteran's period of service.

Similarly, a willingness to elect a higher position is a precondition of every claim to an advancement of status that would otherwise flow simply from continued employment. The statute cannot protect the veteran's right to such advancement if the bare possibility of his refusing to make the election would preclude the application of Section 9.

The bare possibility that sickness might have prevented the veteran from continuing his employment during the period of his military absence is always present. Yet Congress could not conceivably have intended to make the veteran's restoration to the status he would have enjoyed dependent upon the requirement of proving that which, in the nature of things, cannot be conclusively established.

Again, no economist could predict with certainty future changes in an industry and the effect which they may have upon the availability of work for members of a particular craft.[19]

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[19] The impact of the court of appeals' decision is not limited to any one industry. Nonetheless, it should be noted that a dominant aim of the legislation was to aid railroad employees. Representative May, who was in charge of the original bill containing the predecessor of Section 9(c) (see p. 18, *supra*), stated during the House debates, "I may say that the chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character

In summary, there is no case in which it could be predicted with certainty, at the time the veteran entered the service, that all the conditions essential to obtaining an advancement in status would later occur. The decision below is thus incompatible with the declared purposes of Section 9 of the Universal Military Training and Service Act. Congress intended that the veteran enjoy all those benefits of continued employment which, on his return, the veteran can show (with the certainty generally requisite to establish legal rights) that he would have enjoyed simply by virtue of continued employment during the time he was in military service.

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who have certain seniority privileges on the railroads." 86 Cong. Rec. 11702.

It is also appropriate to take some note of the decision's practical effects in that industry. Taking the instant cases as an example, it appears that in the carman and machinist crafts any new men selected to commence the apprenticeship programs must not be over 21 years of age. *Employment Outlook in Railroad Occupations*, Bulletin No. 1300–84, Bureau of Labor Statistics, Department of Labor (1961), p. 725. Even when "helpers" are to be upgraded, the railroads prefer those selected to be under 30. *Id.* The apprenticeship period usually lasts three to four years. *Id.* It is obvious that it is from exactly this group of young men that persons are selected for military service. If these young men are not protected under Section 9 of the Act, the seniority of almost no one in the railroad's entire carman and machinist crafts will be protected, for it is only through these apprenticeship and upgrading programs that persons can advance to journeyman mechanic status in these crafts. *Id.*

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgments of the court of appeals should be reversed.

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